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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-59

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
Petitioner,

vs.

LARRY LUKE, Individually, and as Special Administrator of the Estate of LISA LUKE, deceased, and KATHLEEN LUKE,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

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There has been a complete failure to show any reason why this case should be reviewed by this Court. This matter has been heard by the United States Court of Appeals for the Eighth Circuit, *en banc*, and the majority of the Court has ruled in favor of these Respondents. On May 21, 1973, Petitioner's Second Petition for Rehearing was denied. No request was made by Petitioner for a stay of mandate pursuant to Federal Rules of Appellate Procedure 41 and the mandate of the Court of Appeals issued to the District Court on June 6, 1973, and the judgment of the District Court was entered in accordance with the Court of Appeals' mandate on June 12, 1973.

Petitioner requested a stay of execution of judgment from the Court of Appeals and, upon resistance of these Respondents, such motion for a stay of execution was denied on July 3, 1973. An execution was issued in District Court on July 6, 1973, and the Federal District Court judgment was fully satisfied by the United States Marshal on July 13, 1973, after collecting the sum of $172,680.06 from Petitioner.

The reasons relied upon by Petitioner for the allowance of a writ are without any merit. Further, Petitioner does not challenge the Eighth Circuit Court of Appeals in unanimously affirming coverage. The complaint to this Court seems to be limited to the ruling of the Eighth Circuit Court of Appeals reversing the District Court and allowing these Respondents the excess over Petitioner's policy limits.

Under Point 1, Petitioner claims the opinion of the Eighth Circuit Court of Appeals is in conflict with the previous opinions of the Fifth Circuit Court of Appeals in *Beck* v. *Pennsylvania National Mutual Casualty Insurance Company,* 429 F.2d 813 (5th Cir. 1970) and the Tenth Circuit Court of Appeals in *State Farm Mutual Automobile Insurance Company* v. *Skaggs,* 251 F.2d 356 (10th Cir. 1957). Petitioner claims "In both of those cases there were parallel facts including a declination of coverage and the same issues were presented" (P11). A cursory reading of the cases clearly establishes (1) the facts are not parallel, (2) the same issues were not presented and (3) both decisions were based upon an interpretation of local state law, *i.e.,* the substantive law of Pennsylvania and Oklahoma as required by *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64, 82 L.Ed. 1188 (1937). Such fully explains the differences between the Circuits. The majority opinion of the Eighth Circuit Court of Appeals, *en banc,* and the record, in this case, show the complete

and gross disregard for the rights of Petitioner's insured, Herbert Carl Llewellyn. Petitioner claims the majority of the Eighth Circuit Court of Appeals, *en banc*, refused to follow the state law as expressed by the South Dakota Supreme Court in *Kunkel* v. *United Security Insurance Company of New Jersey*, 168 N.W.2d 723 (S.D. 1969). Contrary to what Petitioner states (P12-13), the majority of the Eighth Circuit Court of Appeals, pursuant to the *Erie Railroad Company* v. *Tompkins, supra*, doctrine, did follow *Kunkel, supra*, in holding Petitioner liable for the excess (A27-28). Under the clear rule established in *Kunkel, supra*, the majority of the Eighth Circuit Court of Appeals, in reversing the District Court, held Petitioner was guilty of bad faith as a matter of law. The Court points out that bad faith stems from the undisputed record that Petitioner failed to fulfill its responsibility to its insured. The record and opinion reflect that once Petitioner refused coverage, it failed to investigate further or even consider the likelihood of excess damage to its insured in light of the facts and circumstances of the case (A27). As stated in the Court's first opinion, although the liability of Petitioner's assured was clear, and the potential damages for the wrongful death of the infant and for the serious injuries to the other Plaintiffs were obviously greater than the policy limits, the Petitioner refused to consider *both* settlement and declaratory relief (A16). And, contrary to Petitioner's claim, the Court of Appeals' first opinion filed November 2, 1972, found liability for the excess in tort as well as a breach of contract under S.D. Code Ann. §21-2-1. The majority of the Eighth Circuit Court of Appeals, *en banc*, did not find it necessary to adopt what Petitioner labels "the rule of per se liability expressed in the *Comunale* case" (P11) because under *Kunkel, supra*, Petitioner was found liable in tort as a matter of law. It is obvious, however, that S.D. Code Ann. §21-2-1 was

properly interpreted and applied in the first opinion of the Eighth Circuit Court of Appeals.

The majority of the Eighth Circuit Court of Appeals, *en banc,* has properly interpreted and applied South Dakota law and Petitioner's claimed conflict between Federal Circuits does not exist.

The ruling of the majority of the Eighth Circuit Court of Appeals, *en banc,* was fully in accord with the law of South Dakota, and which ruling was reached notwithstanding the applicability of S.D. Code Ann. §21-2-1 (1967) under *Comunale* v. *Traders & General Insurance Company,* 328 P.2d 198 (Cal. 1958).

Under Point 2, Petitioner's claim lacks merit. The rule adopted by the majority of the Eighth Circuit Court of Appeals, *en banc,* is in accord with South Dakota law and not in conflict with any other Circuits or decisions of this Court. Petitioner had ample opportunity to litigate its coverage questions by way of a declaratory judgment action because Plaintiffs offered to hold their suits in abeyance to provide Petitioner an opportunity to file a declaratory judgment suit to determine whether coverage was provided (A16). Petitioner should not be heard to complain about any hindsight test when it had its opportunity, with foresight, to litigate the coverage issue. In this case, Petitioner not only refused to defend or negotiate a settlement, but it wrongfully abandoned its assured when he was unable to afford legal counsel and, because of his imprisonment, was unable to conduct his own defense (P12).

Under Point 3, contrary to Petitioner's claim, the Eighth Circuit Court of Appeals did not violate Article I, Section 10, of the Constitution of the United States nor did it act contrary to any South Dakota statute.

Petitioner states that Respondents' action in District Court was for breach of contract (P16). Such statement is not true. Respondents' action in District Court was for breach of contract and in tort as is clearly reflected by the Eighth Circuit Court of Appeals' opinions and the record. In fact, the majority of the Eighth Circuit Court of Appeals allowed recovery in tort. Assuming, *arguendo*, that recovery was allowed for breach of contract, such recovery would be proper under South Dakota law as set out in the first opinion of the Eighth Circuit Court of Appeals. *Big Band, Inc.* v. *Williams*, 202 N.W.2d 121 (1972) is clearly distinguished on its facts and does not preclude recovery of the excess for breach of contract. S.D. Code Ann. §21-1-5 simply states no person can recover a greater amount in damages for the breach of an obligation than he could have gained by full performance. This exact point was covered in *Comunale, supra*. The question is what would Petitioner's assured have gained from full performance of the policy contract? If Petitioner had performed its contract, it would have settled the actions against its assured thereby protecting him from all liability. The allowance of a recovery in excess of the policy limits will not give Petitioner's assured any additional advantage but merely place him in the same position as if the contract had been performed. Petitioner's complaint under this point, however, appears to be moot in view of the majority opinion holding Petitioner was guilty of bad faith as a matter of law.

The Petitioner's conduct in this case shows a complete and gross disregard for the interests of its assured. The decision of the majority of the Eighth Circuit Court of Appeals, *en banc*, is obviously correct and involves no conflict between Federal Circuits or any other basis for review by this Court. Further, Respondents have been paid

the full amount of their Federal District Court judgment pursuant to the opinion and mandate of the Eighth Circuit Court of Appeals.

This Court should end this litigation, once and for all, by denying certiorari.

CONCLUSION

For all of the reasons set forth above, the Petition for Certiorari should be denied.

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